SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 655

LAURENCE DAVIS,

Petitioner,

vs.

NORMAN M. LITTELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Washington, D. C. · [illegible] PRESS · [illegible]

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No.

LAURENCE DAVIS,

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vs.

NORMAN M. LITTELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above entitled case, and in support of said prayer shows as follows:

OPINION BELOW

The opinion of the Court of Appeals is reproduced in the appendix to this petition. It has not yet been published in the Federal Reporter.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) The judgment sought to be reviewed is dated July 15, 1968, and was filed and entered on the same day.

(ii) There has been no order respecting a rehearing or granting an extension of time within which to petition for certiorari.

(iii) 28 U.S.C. 1254(1) is believed to confer on this court jurisdiction to review the judgment below by writ of certiorari.

QUESTION PRESENTED FOR REVIEW

The question is whether the rule of absolute immunity from liability for defamation, accorded to Federal officers by *Barr v. Matteo*, 360 U.S. 564 (1959), and *Howard v. Lyons*, 360 U.S. 593 (1959), extends to attorneys for Indian tribes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Federal statutes involved are 25 U.S.C. secs. 81-84. The Navajo Tribal statutes involved are 2 N.T.C. secs. 821-823 and 881 and 7 N.T.C. 383, 386. Article II, section 6 of the Constitution of Arizona is also involved. All the cited provisions are set out verbatim in the appendix to this petition.

STATEMENT OF THE CASE

The case is accurately, but not completely, stated in the following excerpt from the opinion of the Ninth Circuit:

> Suit was brought by appellant in the District Court for the District of Arizona, with jurisdiction founded on diversity of citizenship. Both parties are non-Indians who were employed by the Navajo Tribe at the time of the alleged defamation: appellee as general counsel, appellant as his assistant. Appellant alleges that due to appellee's defamatory

statements to the Tribal Council and others appellant was discharged from office[1] and suffered loss of reputation.

The District Court rendered summary judgment in favor of appellee, holding, in part:

> "The Navajo Tribe is a sovereign entity within the United States. [citing authority.] The position of the General Counsel of the Navajo Tribe, regardless of the manner of his employment and regardless of the title of his position is comparable to the Chief Legal Officer of the United States, any state thereof, or any political subdivision. * * *
>
> "It is the opinion of the Court that the position of General Counsel for the Navajo Tribe falls within the scope of the doctrine of absolute executive privilege. [citing authority.]"

Both Littell and Davis held their positions as attorneys for the Navajo Tribe under a contract, approved by the Secretary of the Interior pursuant to 25 U.S.C. 81,[2] which antedated the adoption of title 2 secs. 821-823 of the Navajo Tribal Code describing the duties of the tribal legal department (set out in appendix).

Davis alleged actual malice in Littell's publication of falsehoods about him. The dispute between petitioner and respondent is not about whether the libels and slanders were privileged, but whether they are absolutely or qualifiedly privileged.

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[1] Despite use of this word by the Court of Appeals, your petitioner, Davis, has never contended that he held an "office" under the Navajo Tribe.

[2] The contract is dated August 8, 1957, and was approved by the Commissioner of Indian Affairs on November 15, 1957. It was amended five times before Davis's dismissal, and each amendment was approved by the Commissioner. None of the amendments incorporated or referred to the Navajo Tribal Code. A copy of the contract, admitted to be genuine, appears at pages 143-155 of the Transcript of Record.

The Ninth Circuit Court of Appeals decided for absolute privilege.

ORIGINAL BASIS FOR FEDERAL JURISDICTION

The basis for Federal jurisdiction in the United States District Court for the District of Arizona was diversity of citizenship and an amount in controversy in excess of $10,000. See 28 U.S.C. § 1332(a)(1).

REASONS FOR ALLOWANCE OF WRIT

1. *Absolute privilege violates equality before the law.*

The Court of Appeals decision in this case represents absolute privilege run riot.

There are about 788 Indian Tribes in the United States.[3] Under the precedent of the decision below, every time one of them hires a lawyer it issues a liar's license.

Neither Davis nor Littell, the parties to this case, was employed full-time by the Navajo Tribe. Both maintained law offices away from the reservation, and the Navajo Tribe was only one of their many clients, which included other Indian tribes as well as private individuals and corporations.[4] Neither Davis nor Littell was a "public officer," or any kind of officer of the Navajo Tribe, as the Court of Appeals expressly recognizes in its opinion. (See page 15 of opinion in appendix hereto).

The great majority of tribal attorneys, like Littell and Davis, are simply lawyers in private practice, with offices in Washington, D. C., or in some city near the Indian country, like Phoenix, who happen to have an Indian tribe as one of

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[3]This number was supplied to petitioner by the Chief, Tribal Government Section, Bureau of Indian Affairs, U.S. Department of the Interior, on or about September 4, 1968, and includes only tribes recognized by the Bureau.

[4]See Request for Admissions of Fact and Genuineness of Documents (Second Set), T.R. 140, and defendant's answer thereto, T.R. 156.

their clients. They do not prosecute or even appear in the tribal courts, as the attorneys general of the United States and of the several States do in the courts of their employing sovereignties. See 7 Navajo Tribal Code secs. 386, 383 (reproduced in appendix). Tribal attorneys write leases and other contracts, like counsel for landowning corporations—which to a large extent is what modern Indian tribes are. They draft resolutions for the tribal council, as corporation lawyers do for the board of directors. They appear in courts other than those of the tribe, usually in land cases, and lobby the Congress and State legislatures—all functions more characteristic of private corporate counsel than of attorneys general or other public legal officers.

The Ninth Circuit decision which petitioner seeks to have reviewed gives these lawyers, alone among the many private practitioners in their communities, the absolute privilege of taking vengeance on their personal enemies, simply by telling plausible lies about them to the tribal council, in public session, and then repeating the lies to newspaper reporters.

It may be that the cutting edge of the law of libel ought to be blunted along its length on First Amendment grounds,[5] but to gouge out loopholes of absolute privilege for particular wrongdoers based on their holding attorney contracts with Indian tribes is wholly irrational. It amounts to no less than denial of equality before the law.

2. *The court of appeals falsely predicted the applicable State law.*

While the decision in this case, a defamation claim brought into Federal court under diversity jurisdiction, purports to be a matter of State law, it is in reality no such

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[5]As this court did in the cases involving libel of public figures. See St. Amant v. Thompson, 390 U.S. 727 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

thing. No State court—apparently no court anywhere before the Ninth Circuit—has spoken on the question in issue. The Court of Appeals "predicted," i.e., made, both the law of Arizona and the law of the Navajo Tribe for this case.

In reality, jumping to the conclusion that Littell was *de facto* attorney general of the Navajo Tribe, it simply followed *Barr v. Matteo*, 360 U.S. 564 (1959) and *Howard v. Lyons*, 360 U.S. 593 (1959), cases which held Federal officers absolutely immune from civil liability for libel. It cited a decision of an intermediate appellate court of Arizona, *Long v. Mertz*, 2 Ariz. App. 215, 407 P.2d 404 (1965), based on *Barr* and *Howard*, which gave absolute immunity to a State officer, and reasoned that the Arizona courts would give the same privilege to Littell out of comity to the Navajo Tribe.

If the law of this Court on slanders by Federal employees is applicable here, the Ninth Circuit followed the wrong precedent. Seven of Littell's eleven slanders alleged in the complaint were spoken to legislative bodies of the Navajo Tribe. His contract provided, among other things, that he should report to the Tribal Council "on any matters pertaining to the legal affairs of the tribe." Obviously he was acting as a legislative rather than executive counsel when he published the slanders in question. If he were a Federal officer, *Dombrowski v. Eastland*, 387 U.S. 82 (1967),[6] which grants legislative counsel only qualified privilege, would govern, rather than the absolute privilege cases applicable to executive officers. It can reasonably be predicted that the Arizona court which followed *Barr* for an executive employee of the State would follow *Dombrowski* for a legislative employee.

Further, the Supreme Court of Arizona, in the only case where it has considered official immunity for defamation, held a school board member had only qualified privilege for

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[6]See also Kilbourn v. Thompson, 103 U.S. 168 (1880).

a slander published at a board meeting about a teacher in the school system. *Connor v. Timothy*, 43 Ariz. 517, 33 P.2d 293 (1934). If the Navajo Tribal Council is considered as a deliberative body subordinate to the Congress of the United States, as a school board is subordinate to the State legislature, it appears reasonable to predict that the Arizona courts would give the lawyer for the Tribal Council only qualified privilege for his slanders of another tribal employee.

Moreover, the Constitution of Arizona gives the right to a remedy for defamation equal protection to that given free speech. Section 6 of Article II, Declaration of Rights, the free speech guarantee of the Arizona Constitution, does not follow the wording of the First Amendment, but reads as follows:

> Every person may freely speak, write, and publish on all subjects, *being responsible for the abuse of that right.* [Emphasis added.]

Therefore, it is probable that the Ninth Circuit in the decision against which this petition is directed predicted State law incorrectly.[7]

3. *The Court of Appeals ignored controlling Federal law.*

The relations between lawyers and Indian tribes which are their clients are governed almost exclusively by Federal law. *Udall v. Littell*, 366 F.2d 668 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967), rehearing denied, 386 U.S. 939 (1967). The applicable Acts of Congress appear as 25 U.S.C. Secs. 81-84 (reproduced in appendix). These laws, enacted as a result of shameless overreaching of Indian tribes by white attorneys,[8] provide that the Indians' hiring

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[7]There is authority, moreover, that in cases involving Indian matters, the Federal courts may fashion their own common law without reference to State decisions. United States v. Farness, 125 F.2d 928, 937 (2d Cir. 1942), cert. denied, 316 U.S. 694 (1942).

[8]See House Report No. 98, 42d Congress, 3d Session (Serial 1578), entitled "Investigation of Indian Frauds" (1873). And for

of attorneys (which must be by written contract), the attorneys' performance, and the payment of their fees are subject to strict control and supervision by the Secretary of the Interior. These laws go so far as even to abrogate the normal attorney-client privilege of confidentiality, to the extent that the tribe's lawyer must submit sworn service records to the Commissioner of Indian Affairs "showing each particular act of service . . . giving date and fact in detail." 25 U.S.C. § 82. In sum, these laws show that Congress feels white lawyers for Indian tribes are not to be trusted, and ought to be kept under constant scrutiny. They completely destroy the presumption of trustworthiness, applicable to the carefully selected Federal officer, which lies at the bottom of the *Barr* and *Howard* rules.

In addition, these laws prevent white lawyers from becoming officers of Indian tribes, since they require the attorney to serve by virtue of contract, under Federal supervision, and not by virtue of tribal law. Cf. *Adams v. Murphy*, 165 Fed. 304 (8th Cir. 1908).[9]

The statement of the Court of Appeals (see appendix, p. 15 below) that the Navajo Tribe has sufficient independent status to accord absolute privilege to its officers within areas of tribal control is therefore quite beside the point. A tribal attorney is not an officer of the tribe, and his performance is not within the control of tribal law.

The Court of Appeals admits (at page 15 of its opinion, see appendix) that the Navajo Tribe has never attempted to confer absolute privilege on its lawyers. If it could, it ought not.

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continued existence of similar abuses, see Senate Report No. 8, 83d Congress, 1st Session (Serial 11659), entitled "Attorney Contracts with Indian Tribes" (1953), Senate Report No. 1593, 90th Congress, 2d Session (1968), and House Report No. 1873, 90th Congress, 2d Session (1968).

[9]Appointment and control by law rather than by contract is perhaps the chief distinction between one who is a public officer and one who is not. See 67 C.J.S. 113, Officers, Sec. 5(b)(4) and cf. sec. 6. The Navajo Tribal Council knows how to create an office when it wishes to. Compare 2 N.T.C. sec. 881 with sec. 822.

The *Navajo Yearbook of Planning in Action, Report No. V*, Calendar Year 1955, published by the Bureau of Indian Affairs, stated at page 119:

> Navajo is still the most common language in the Navajo country, in view of the fact that a large proportion of the Navajo population is still unschooled and unable to make effective use of English . . .
>
> Council and Advisory Committee meetings are bilingual, with an interpreter to translate from one language to the other.

The *Navajo Yearbook, Report No. VII* (1961), covering the actual period during which the slanders involved in this case were published, states that nearly all Navajo children enter school without the ability to speak English (p. 20). In 1961 there were only 130 Navajo Indians with college degrees (p. 354), out of a total population of 80,364 (1960 census, adjusted, p. 311). Literacy statistics are not resported; but in 1960 probably 75% of the total Navajo population and about 50% of the Tribal Council members were illiterate.

In such an environment it takes the truth a very long time to catch up with a lie, especially one told by a prestigious white lawyer from Washington on the solemn occasion of a Tribal Council meeting. Truth, which is the only remedy for a lie under the *Barr-Howard* rule, may be adequate where the liar is a Federal officer speaking to informed and sophisticated Americans and subject to exposure by a vigorous press. It is a pathetically inadequate remedy under the circumstances of this case.

The libels and slanders against Davis are not the only misconduct of which Littell is guilty. They are part of the pattern of increasing dishonesty toward his Navajo clients for which Littell was finally removed from the position of General Counsel of the Tribe. The background of the removal is set out in *Udall v. Littell*, 366 F.2d at 671:

> In March 1963 Raymond Nakai was elected Chairman of the Navajo Tribal Council on a plat-

> form including a demand for the dismissal of Appellee as General Counsel. In his campaign Nakai claimed that Appellee had improperly obtained an increase in his annual fee from $25,000 to $35,000. After his election the new Chairman requested Appellee to refrain from taking part in Tribal political affairs. The new Chairman was unable to secure a majority vote in the Tribal Council to terminate Appellee's contract. However, the Tribal Council's Advisory Committee did adopt a resolution calling on the Secretary of the Interior to "investigate, audit and terminate" Appellee's contract for various reasons including an expressed fear that Appellee was using the time and services of salaried staff attorneys on Appellee's claims work covered by the 10% contingent fee contract.

The Secretary of the Interior did investigate, and found Littell guilty of three serious violations of professional obligations toward the Navajo Tribe. The removal followed, after extensive litigation.[10]

The filing of the present case, *Davis v. Littell*, in the U.S. District Court in May of 1961 was the first public disclosure of Littell's dishonesty toward the Navajos. It received widespread publicity, and undoubtedly contributed to making Littell's misconduct an issue in the tribal election campaign of 1963.

If the Ninth Circuit decision which is here sought to be reviewed had been in effect in 1961, *Davis v. Littell*, of course, would never have been filed. Littell's other conduct might not have been investigated, and his depredations against his client might have continued years longer and on an increasing scale.

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[10]See Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965); Udall v. Littell, 338 F.2d 537 (D.C. Cir. 1964); Littell v. Udall, 242 F.Supp. 635 (1965); Udall v. Littell, 366 F.2d 668 (D.C. Cir. 1966), cert. denied, 385 U.S. 1007 (1967), rehearing denied, 386 U.S. 939 (1967).

Certainly it is not in the best interest of the Indian tribes to shield their lawyers' misconduct from exposure.

The decision of the Ninth Circuit in this case does exactly that. Federal public policy demands reversal.

A writ of certiorari ought to issue.

Respectfully submitted,

LAURENCE DAVIS
140 Duddington Place, S.E.
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In propria persona

October 14, 1968

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAURENCE DAVIS, *Appellant,* vs. NORMAN M. LITTELL, *Appellee.*	No. 21,578

[July 15, 1968]

On Appeal from the United States District Court for the District of Arizona

Before: MERRILL and CARTER, Circuit Judges, and WEIGEL, District Judge

MERRILL, Circuit Judge:

The question presented by this appeal is whether appellee, by virtue of his position as general counsel for the Navajo Tribe, was entitled to assert absolute privilege as to defamatory statements made by him within the scope of his official duties.

Suit was brought by appellant in the District Court for the District of Arizona, with jurisdiction founded on diversity of citizenship. Both parties are non-Indians who were employed by the Navajo Tribe at the time of the alleged defamation: appellee as general counsel, appellant as his assistant. Appellant alleges that due to appellee's defamatory statements to the Tribal Council and others appellant was discharged from office and suffered loss of reputation.

The District Court rendered summary judgment in favor of appellee, holding, in part:

> "The Navajo Tribe is a sovereign entity within the United States. [citing authority.] The position of the General Counsel

> of the Navajo Tribe, regardless of the manner of his employment and regardless of the title of his position is comparable to the Chief Legal Officer of the United States, any state thereof, or any political subdivision. * * *
>
> It is the opinion of the Court that the position of General Counsel for the Navajo Tribe falls within the scope of the doctrine of absolute executive privilege. [citing authority.]"

The holding of the District Court involves several issues upon each of which appellant disputes the court's ruling. Arizona has not spoken upon these issues. Thus the rulings entail a prediction, stated generally, as to the extent to which the courts of the State of Arizona would attribute to the Navajo Tribe (and on its behalf enforce) a rule which the state, in the public interest, has seen fit to formulate on its own behalf. The District Court by its ruling has credited Arizona with an attitude of substantial deference to the Navajo Tribe to the detriment of rights of its own state citizens. Each question, as hereafter discussed, may rationally be answered to support the District Court's conclusions. Under the circumstances we are unable to say that in any respect the court has misconceived Arizona's atitude respecting its relationship with the Navajo Tribe or has erroneously stated the law of Arizona.

1. *Whether the Navajo Tribe is such a sovereign as can bestow absolute privilege upon its officers*

There can be little doubt that, with substantial federal domination of Indian affairs, the status of Indian tribes is an uncertain one today. See Oliver, *The Legal Status of American Indian Tribes*, 38 Ore. L. Rev. 193 (1959). The Supreme Court has long recognized the ambiguity of their position as both "domestic dependent nations" and wards of the federal government. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Nevertheless, the concept of tribal sovereignty has been found a sufficient basis for extending to Indian tribes sovereign immunity from suit. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). We have recognized tribes to be "distinct political communities," *Littell v. Nakai*, 344 F.2d 486, 488 (9th

Cir. 1965), *cert. denied,* 382 U.S. 986 (1966), and it has been held that "Indian tribes * * * still possess their inherent sovereignty excepting only where it has been specifically taken from them, either by treaty or by Congressional Act." *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation,* 231 F.2d 89, 94 (8th Cir. 1956).

In our judgment it can hardly be disputed that the Navajo Tribe enjoys sufficient independent status and control over its own laws and internal relationships to be able to accord absolute privilege to its officers within the areas of tribal control.

2. *Whether the Navajo Tribe can be said to have bestowed absolute privilege on its executive officers*

It has not done so in its Tribal Code, nor, so far as we are informed, by any decision of its Tribal Court. By its Code, however (Navajo Tribal Code, tit. 7, ch. 3, §34(C)), it would, under such circumstances be guided by federal or appropriate state law. As to federal officers, absolute executive privilege has long been established by court decision. *Barr v. Matteo,* 360 U.S. 564 (1959); *Spalding v. Vilas,* 161 U.S. 483 (1896). The Navajo tribal capital is in Window Rock, Arizona. The State of Arizona has adopted the rule of *Barr v. Matteo* as to its state officers. *Long v. Mertz,* 2 Ariz. App. 215, 407 P.2d 404 (1965).

3. *Whether appellee is such an officer of the Navajo Tribe as can claim absolute executive privilege*

Certainly appellee's position with the Tribe was not a public office in the ordinary sense. It was employment under contract and terminable as such. *Udall v. Littell,* 366 F.2d 668 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1007 (1967); *Adams v. Murphy,* 165 Fed. 304 (8th Cir. 1908). But this fact should not control in the disposition of the instant problem.

The need for absolute privilege is in the elimination of the "constant dread of retaliation" for injury committed in the course of duty and the allowance of "unflinching discharge of [official] duties" free from the threat of suit and charge of malice. *Gregoire*

v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

The question, then, is not how the position is filled or the security of its tenure but whether it encompasses public duties, official in character. Here the Tribal Code, tit. 2, ch. 5, §821, prescribes that the office of general counsel shall "Perform those functions generally required of a General Counsel's office in organizations engaged in the administration of public affairs." Duties are not limited to representing the Tribe in its disputes with others. They include advice with respect to the administration of the public affairs of the Tribe.

An important element of appellant's complaint is that defamation resulted from the manner in which appellee reported to the Tribal Council his views as to the competence and integrity of appellant, a subordinate employee. These are precisely the duties which were regarded as requiring the protection of privilege in *Barr v. Matteo, supra,* and *Gregoire v. Biddle, supra.*

Appellant protests that historically those who have served as general counsel for Indian tribes (and appellee in particular) have not demonstrated that unselfish dedication to the public interest which should qualify them for immunity from suit as public officers. As we have noted, however, the rule of privilege is not founded on the need of the individual officer, but on the public need for the performance of public duties untroubled by the fear that some jury might find performance to have been maliciously inspired.

That a tribe finds it necessary to look beyond its own membership for capable legal officers, and to contract for their services, should certainly not deprive it of the advantages of the rule of privilege otherwise available to it.

4. ***Whether an Arizona state court would or should honor privilege bestowed by a foreign sovereign in a suit brought by an Arizona citizen***

Appellant, with substantial scholarly support,[1] attacks the rule of absolute executive privilege as unjust and outmoded and urges against its extension into areas not yet expressly committed to it.[2]

The rule may indeed be subject to criticism but we find it somewhat inconsistent for one jurisdiction to cherish the rule for itself while denying its benefits to a sovereign which does not possess the economic power to provide a just alternative.

The question really addresses itself not to the merits of the rule, but to the extent to which Arizona state courts would accord comity to an Indian tribe geographically located within the state boundaries. As we have already stated, we are unable to say that the District Court erred in its prediction in this respect.

Judgment affirmed.

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[1]See 3 K. Davis, *Administrative Law Treatise*, §26.04, page 528 (1958); Becht, *The Absolute Privilege of the Executive in Defamation*, 15 Vand. L. Rev. 1127 (1962); Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 Harv. L. Rev. 44 (1960); Gray, *Private Wrongs of Public Servants*, 47 Calif. L. Rev. 303 (1959).

[2]The author of this opinion has voiced objection to extension of the rule in his concurring opinion in *S & S Logging Co. v. Barker*, 366 F.2d 617, 626 (9th Cir. 1966).

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,578

LAURENCE DAVIS, Appellant,

v.

NORMAN M. LITTELL, Appellee.

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered July 15, 1968.

[Filed: Sep. 30, 1966]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ-711-Pct.
ORDER

LAURENCE DAVIS, Plaintiff,

v.

NORMAN M. LITTELL, Defendant.

The above entitled cause came on for hearing before the Court upon the defendant's motion for summary judgment and upon the motion of the defendant to compel answers to certain questions propounded to plaintiff upon the taking of his deposition in Phoenix, Arizona, April 16, 1966.

Plaintiff's cause of action is based upon certain alleged defamatory statements attributed to the defendant while the defendant was acting in his capacity as General Counsel for the Navajo Tribe. Defendant's motion for summary judgment is based upon the proposition that if the statements attributed to the defendant were in fact uttered by him the statements so uttered come within the doctrine of absolute executive privilege. The Navajo Tribal Code sets forth the various departments of government of the Tribe and the functions of the several departments. Chapter 5 of the Tribal Code, designated "Executive Branch", Title 2, Section 821, sets forth the functions of the legal department.

Section 821, *supra*, provides in part as follows:

"The Legal Department shall have the following functions:

"(1) Perform those functions generally required of a general counsel's office in organizations engaged in the administration of public affairs.

* * *

"(10) Make reports to the Chairman, the Advisory Committee, or the Tribal Council on any matters pertaining to the legal affairs of the Tribe when the best interests of the Tribe so require."

Section 822, Title 2, provides:

"An attorney and associate attorneys shall be employed to act as general counsel for the Navajo Tribe."

Section 823 provides:

"The legal work of the Navajo Tribe shall be under the direction of the General Counsel who, with associate attorneys, shall be responsible to the Chairman of the Tribal Council, subject to such instructions as they may receive from time to time from the Advisory Committee or the Navajo Tribal Council."

The Navajo Tribe is a sovereign entity within the United States. *Littel v. Nakai,* 344 F.2d 486; *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269. The position of the General Counsel of the Navajo Tribe, regardless of the manner of his employment and regardless of the title of his position is comparable to the Chief Legal Officer of the United States, any state thereof, or any political subdivision. It is uncontroverted that the statements attributed to the defendant were made in the course of the conduct of the affiars of his office, with the possible exception of the statement assertedly made to a news media reporter in the District of Columbia.

It is the opinion of the Court that the position of General Counsel for the Navajo Tribe falls within the scope of the doctrine of absolute executive privilege, *Gregoire v.*

Biddle, 177 F.2d 579; *Barr v. Mateo*, 360 U.S. 564; *Howard v. Lyons*, 360 U.S. 593; *Bershard v. Wood*, 290 F.2d 714; *Long v. Mertz*, 407 P.2d 404.

With respect to the utterance attributed to the defendant in conversations with the news media, it is the conclusion of the Court that such communications are also privileged. *Barr v. Mateo, supra; Glass v. Ickes*, 117 F.2d 273; *Mellon v. Brewer*, 18 F.2d 168; *Matson v. Margiotti*, 88 Atl. 2d 892.

Defendant's motion for summary judgment is granted.

In view of the foregoing disposition of the motion for summary judgment, the motion of the defendant to compel answers to questions submitted on the taking of plaintiff's deposition becomes moot.

Dated this 27th day of September, 1966.

Walter E. Craig
United States District Judge

[Filed: October 13, 1966]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 711-Pct.
AMENDED JUDGMENT

LAURENCE DAVIS, Plaintiff,

v.

NORMAN M. LITTELL, Defendant.

This action came on for hearing before the Honorable Walter E. Craig, United States District Judge, on the motion of defendant for summary judgment against plaintiff on his complaint. The Court having previously rendered its decision granting defendant's motion for summary judgment aforesaid,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing by his complaint in this action, and that the same be dismissed on the merits. The Court hereby determines that there is no just reason for delay in the entry of final judgment dismissing the complaint, and it is hereby directed that such judgment be entered forthwith.

DONE IN OPEN COURT, this 13th day of October, 1966.

Walter E. Craig, Judge

FEDERAL STATUTES

United States Code, Title 25:

Sec. 81. *Contracts with Indian tribes or Indians.*

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or offical acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupations; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid. (R.S. Sec. 2103; Aug. 27, 1958, Pub. L. 85-770, 72 Stat. 927).

Sec. 81a. *Counsel for prosecution of claims against the United States; cancellation; revival.*

Any contracts or agreements approved prior to June 26, 1936, by the Secretary of the Interior between the authorities of any tribe, band, or group of Indians and their attorneys for the prosecution of claims against the United States, which provide that such contracts or agreements shall run for a period of years therein specified, and as long thereafter as may be required to complete the business therein provided for, or words of like import, or which provide that compensation for services rendered shall be on a quantum-meruit basis not to exceed a specified percentage, shall be deemed a sufficient compliance with section 81 of this title: *Provided, however,* That nothing herein contained shall limit the power of the Secretary of the Interior, after due notice and hearing and for proper cause shown, to cancel any such contract or agreement: *Provided further,* That the provisions of this section and section 81b of this title shall not be construed to revive any contract which has been terminated by lapse of time, operation of law, or by acts of the parties thereto. (June 26, 1936, ch. 851, Sec. 1, 49 Stat. 1984).

Sec. 81b. *Continuation of contracts with attorneys containing limitation of time where suits have been filed.*

Any existing valid contract made and approved prior to June 26, 1936, pursuant to any Act of Congress by any tribe, band, or group of Indians with an attorney or attorneys for the rendition of services in the prosecution of claims against the United States under authority of which suit or suits have been filed, and which contains a limitation of time for the completion of the services to be performed may be continued in full force unless a subsequent contract dealing with the same subject matter has been made and approved. (June 26, 1936, ch. 851, Sec. 2, 49 Stat. 1984).

Sec. 82. *Payments under contracts; aiding in making prohibited contracts.*

No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract. (R.S. Sec. 2104).

Sec. 84. *Assignments of contracts restricted.*

No assignment of any contracts embraced by section 81 of this title or of any part of one shall be valid, unless the names of the assignees and their residences and occupations be entered in writing upon the contract, and the

consent of the Secretary of the Interior and the Commissioner of Indian Affairs to such assignment be also indorsed thereon. (R.S. Sec. 2106).

NAVAJO TRIBAL STATUTES

Navajo Tribal Code:

Title 2, Chapter 5

Subchapter 2. Legal Department

Sec. 821. *Functions*

The Legal Department shall have the following functions:

(1) Perform those functions generally required of a general counsel's office in organizations engaged in the administration of public affairs.

(2) Furnish counsel to appear before all courts, departments, tribunals, and commissions of the Federal Government and before committees of Congress, in all Tribal matters, and to appear when necessary and proper before executive officers.

(3) Prepare drafts of proposed legislation on behalf of the Tribe for submission to Congress and to State legislatures, and to advise the Tribe in respect to all legislation whether proposed by the Tribe or otherwise bearing upon Tribal affairs, and to appear in support of, or opposition to such legislation as the interest of the Tribe requires.

(4) Prepare the pleadings, briefs, and other necessary papers, and to appear in court for any administrative proceedings in which the tribe is involved, including appeals thereof.

(5) Where requested by the Chairman, Council or Advisory Committee, review as to form and substance such leases and other contracts as may be submitted to them to which the Tribe proposes to become a party.

(6) Participate in the making of agreements or compacts between the Tribe and any other agency regarding the

use of water, land or other resources in which the Tribe may have a joint interest with such agency.

(7) Assist the members of the Tribal staff and the Tribal Council in the conduct of relations with state and Federal officials.

(8) Supervise and direct the operations of an office known as the Navajo Legal Aid Service, designed to assist individual Navajos with problems in which preliminary legal advice and consultation are needed, and, in collaboration with Bar Associations of other states, to assist in procuring legal aid, or the employment of attorneys to protect the interest of Navajos who are confronted with the need for criminal or civil lawyers; for the relief and assistance of Navajo families on the Reservation.

(9) Prepare drafts of Tribal Council and Advisory Committee resolutions on request of the officers or members of the Council or Advisory Committee; assemble resolutions after adoption with a record of action by the Tribal authorities and the Commissioner of Indian Affairs and to arrange the same for annual publication, printing, binding, and distribution; and supervise and assist in arranging for the codification of all Tribal Council and Advisory Committee enactments.

(10) Make reports to the Chairman, the Advisory Committee, or the Tribal Council on any matters pertaining to the legal affairs of the Tribe when the best interests of the Tribe so require.

HISTORY

Source Tribal Council Res. CAU-50-59, Sec. 1, passed Aug. 6, 1959. See, also, Sec. 763 of this title.

Sec. 822. *General Counsel-Employment*

An attorney and associate attorneys shall be employed to act as General Counsel for the Navajo Tribe.

HISTORY

Source Tribal Council Res. 1922-1951 Res. p. 528, passed July 9, 1947.

Revision note. This section has been set out in general terms, although Tribal Council Res. 1922-1951, p. 528, passed July 9, 1947, selected Norman M. Littell to act as General Counsel and Claims Attorney.

* * *

Sec. 823. *Direction of legal work*

The legal work of the Navajo Tribe shall be under the direction of the General Counsel who, with associate attorneys, shall be responsible to the Chairman of the Tribal Council, subject to such instructions as they may receive from time to time from the Advisory Committee or the Navajo Tribal Council.

HISTORY

Source Tribal Council Res. CAU-50-59, Sec. 1, passed Aug. 6, 1959. See, also, Sec. 763 of this title.

* * *

Subchapter 3. Executive Secretary

Sec. 881. *Creation of office; duties*

There is created the office of the Executive Secretary of the Tribe to fulfill and carry out that portion of the duties of the Secretary-Treasurer which are normally discharged in the office of the Secretary, and the additional duties prescribed by Sec. 882 of this title.

HISTORY

Source Tribal Council Res. CF-15-57, passed Feb. 7, 1957.

Title 7

Sec. 383. *Action in name of Navajo Tribe; authority to bring*

The Chairman of the Tribal Council or such person as he shall designate is authorized to bring an action in the name of the Navajo Tribe, in any case where the Navajo Tribe is a plaintiff, in the Courts of the Navajo Tribe.

Sec. 386. *Attorneys; right of representation; appointment of prosecutor*

Professional attorneys shall not appear in any proceedings before the Court of the Navajo Tribe unless rules of court have been adopted as set forth in section 381 of this title prescribing conditions governing their admission and practice before the court. Every defendant shall have the right to have some member of the Tribe represent him and in the event he has no such representation, a representative may be appointed by the judge. The judge may appoint a member of the Tribe as prosecutor.

ARIZONA CONSTITUTIONAL PROVISION

CONSTITUTION OF THE
STATE OF ARIZONA
AS AMENDED

(From Vol. 1, Arizona Revised Statutes, 1956)

ARTICLE II

Declaration of Rights

Section 6. Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon Norman M. Littell, respondent herein, by mailing two copies thereof, air mail postage prepaid, to his counsel of record, addressed as follows:

Mr. William H. Rehnquist
Powers and Rehnquist
Attorneys for Norman M. Littell
807 Security Building
Phoenix, Arizona 85004

I further certify that I am a member of the bar of this Court.

Dated: October , 1968.

Laurence Davis
Petitioner

SUPREME COURT U. S.

FILED

NOV 12 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 655

LAURENCE DAVIS,
Petitioner,

vs.

NORMAN M. LITTELL,
Respondent.

Brief in Opposition to Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 655

LAURENCE DAVIS,
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Brief in Opposition to Certiorari

Petitioner states the question presented for review in terms of an "extension" of the rule of immunity from liability for defamation accorded to federal officers by *Barr v. Matteo,* 360 U.S. 564 (1959), and *Howard v. Lyons,* 360 U.S. 593 (1959). The opinions of both the Court of Appeals and the District Court,* however, show that the question is a much narrower one. The basis for federal jurisdiction in the District Court was diversity of citizenship, and in such a case the federal court, under the rule of *Erie v. Tompkins,* 304 U.S. 64 (1938), is obligated to follow the

*The Court of Appeals affirmed the judgment of the District Court, and petitioner did not seek a rehearing in the Court of Appeals.

substantive law of the state in which it sits. The Court of Appeals correctly summarized the matter in the following portion of its opinion.

> "Thus the rulings [of the District Court] entail a prediction, stated generally, as to the extent to which the courts of the State of Arizona would attribute to the Navajo Tribe (and on its behalf enforce) a rule which the state, in the public interest, has seen fit to formulate on its own behalf. The District Court by its ruling has credited Arizona with an attitude of substantial deference to the Navajo Tribe to the detriment of rights of its own state citizens. Each question, as hereafter discussed, may rationally be answered to support the District Court's conclusions. Under the circumstances we are unable to say that in any respect the Court has misconceived Arizona's attitude respecting its relationship with the Navajo Tribe or has erroneously stated the law of Arizona." (Petition for Certiorari, p. 14)

The courts below were not dealing with questions of the privilege accorded to federal officers by federal law, but rather with questions of the extent to which an Arizona state court would recognize the laws of the Navajo Tribe on the question of immunity of high public officials from liability for defamation. As in many other diversity cases, the District Court was obliged to predict the attitude of an Arizona court without any guidance from a case or statute squarely in point. The District Court relied on an Arizona case which it considered to be analogous, and on provisions of the Navajo Tribal Code which referred matters not covered by that Code to the laws of the state in which the dispute arose.

Thus there is presented for decision, not the interpretation of the federal rule for federal officers laid down by

this Court, but instead a question of whether the District Court and the Court of Appeals in a diversity case have correctly predicted what law would be applied by Arizona in a particular dispute. Petitioner does not, and cannot cite authority which even hints that the delimitation of the doctrine of executive privilege against defamation, either under the law of Arizona or of the Navajo Tribe, is of federal constitutional significance. It is but stating the obvious to say that there is nothing in the decision below which comes even remotely within the standards contained in Rule 19 of this Court relating to "Considerations Governing Review on Certiorari".

Were this Court to concern itself with the merits of the case, it would find petitioner's attack on the decision of the Court of Appeals devoid of support in either precedent or policy. The courts below relied upon the principal Arizona case in point, *Long v. Mertz,* 2 Ariz. App. 215, 407 P.2d 404, in which review was denied by the State Supreme Court. *Long v. Mertz* held that the doctrine of absolute privilege for high executive officers was applicable, as a matter of state law, to an engineer who was in charge of the contracts and specifications division of the Arizona Highway Department. The courts below reasoned that since the Navajo Tribe had not enunciated a policy one way or the other on the question, but since under the provisions of the Tribal Code the Tribe in such a situation would be guided by "federal or appropriate state law," (Opinion, Court of Appeals, Petition For Certiorari, p. 15), the Tribe would extend this privilege to its principal legal officer. Since respondent Littell occupied the position of General Counsel which was established by the Tribal Code, and because he was under a duty to "perform those functions generally required of a general counsel's office in organiza-

tions engaged in the administration of public affairs", this conclusion was entirely consistent with *Spalding v. Vilas,* 161 U.S. 483 (1896), and *Barr v. Matteo, supra.* Indeed, in the case of respondent, it is not even necessary to resort to that phase of absolute immunity which extends the privilege to "second level" executive officers, such as was done in *Long v. Mertz, supra,* and *Barr v. Matteo, supra. Spalding v. Vilas,* decided seventy-two years ago, extending the privilege to the Postmaster General, is sufficient to cover the situation of respondent. The fact that respondent held his employment by contract is quite irrelevant. *Yaselli v. Goff,* 2d Cir., 12 F.2d 396 (1926). The fact that other aspects of respondent's relationship with the Tribe are controlled by Congressional enactment is likewise beside the point, for in those areas where Congress has not extinguished the sovereignty of the Indian Tribes, they remain sovereign and are empowered to establish their own rules of law. *United States v. United States Fidelity and Guaranty Co.,* 309 U.S. 506 (1940); *Jones v. Mehan,* 175 U.S. 1 (1899).

If the policy arguments of petitioner be sifted from his highly colored accusations against respondent (with respect to matters which are in no way involved in this case), petitioner appears to claim that for the Navajo Tribe or the State of Arizona to apply a rule such as was applied here would result in a failure to uncover misdeeds of public officials. However, nothing in any of the rules adopted by the courts below has in any way impaired petitioner's right to speak out against the claimed misconduct of respondent or of anyone else; it is only petitioner's right to recover money damages from respondent when respondent speaks out against petitioner's misconduct that is cut off by the opinion rendered below. Freedom to criticize public officials

is obviously helped, rather than hindered, by the decision of the Court of Appeals in this case.

Questions of both policy and precedent to which petitioner adverts were for resolution in the first instance by the courts and legislatures of the Navajo Tribe and the State of Arizona. The only involvement of the lower federal courts in this case was their obligation to predict, in a diversity of citizenship action, what those decisions would be in a given set of circumstances. The resulting predictions of those courts afford no basis for the granting of review by this court.

Respectfully submitted,

JOSEPH S. JENCKES, JR.
Attorney for Respondent

WILLIAM H. REHNQUIST
Of Counsel